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No. 247

In the Supreme Court of the United States

OCTOBER TERM, 1943

NEW YORK HANDKERCHIEF MFG. CO., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 43–45) is reported at 142 F. 2d 111. The District Court did not render an opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 25, 1944 (R. 46). The petition for a writ of certiorari was filed July 12, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the District Court had jurisdiction of petitioner's suit for refund of amounts paid as floor stocks taxes under the Agricultural Adjustment Act even though Section 903 of the Revenue Act of 1936 prohibits the allowance of a refund in the absence of the filing with the Commissioner of Internal Revenue of a claim for refund in accordance with Regulations promulgated by the Commissioner, with the approval of the Secretary of the Treasury, and petitioner, contrary to the requirements of the applicable Regulations, submitted no factual evidence to the Commissioner in support of its assertion that the burden of the taxes paid by it had not been shifted to others.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Regulations are set forth in the Appendix, *infra*, pp. 10–14.

STATEMENT

On August 9, 1937, petitioner filed a claim with the Commisioner of Internal Revenue for refund, under Title VII of the Revenue Act of 1936, of $3,654.30 paid as floor stocks taxes under the provisions of the Agricultural Adjustment Act (R. 11–17). Under Schedule D of the claim form, where the claimant was directed to list evidence submitted with the claim, petitioner stated that it bore the full burden of the taxes for which refund was sought, but listed no evidence in sup-

port of the claim (R. 15). The Commissioner at first rejected the claim as having been filed too late (R. 19–20). Congress subsequently extended the time for filing such claims (Section 405, Revenue Act of 1939, c. 247, 53 Stat. 862 (7 U. S. C. 1940 ed., Sec. 645)) and the Commissioner then notified petitioner that its claim was thereby reopened for consideration on its merits (R. 20). In his notification letter, the Commissioner also advised petitioner that (R. 20):

> In claims of this character, section 902 of the Revenue Act of 1936 prohibits the allowance of a refund unless the claimant establishes that he bore the burden of the tax for which refund is claimed and did not shift it, directly or indirectly, to other persons or in any manner whatsoever. Accordingly, before favorable consideration may be given to your claim, you must submit evidence which will clearly establish that you bore the burden of the tax and did not shift it to others. Submission of such evidence at an early date will expedite final consideration of your claim.

On February 1, 1940, the Commissioner again wrote to petitioner advising it that sufficient evidence had not been submitted as required by Section 902 of the Revenue Act of 1936 and suggesting in considerable detail several kinds of evidence which it might furnish in support of its claim (R. 21–22). The letter concluded with the following statement (R. 22):

> The evidence establishing that you bore the burden of the tax should be submitted to this office not later than March 4, 1940.

The requested evidence was not received by March 4, 1940, and the Commissioner again wrote to petitioner, giving it thirty more days to furnish the evidence (R. 22). This extension of time was superseded by another to May 6, 1940, at petitioner's request (R. 23). Finally, a letter written under oath on April 13, 1940, was received by the Commissioner from petitioner advising that the requested records were not available since they had been destroyed due to the lack of adequate space to maintain them for so long a period (R. 24). On May 4, 1940, the Commissioner notified petitioner that its claim for refund was rejected since it had failed to establish that it bore the burden of the tax (R. 24–25).

Petitioner filed a complaint in the United States District Court for the Northern District of Illinois on May 1, 1942, seeking judgment for the $3,654.30 paid as floor stocks taxes for which claim had been made to the Commissioner and rejected (R. 2–4). On July 30, 1942, the Government filed a motion to dismiss the complaint on the ground that the court had no jurisdiction to grant the relief requested (R. 8–9). The motion was based upon Section 903 of the Revenue Act of 1936, which prohibits the allowance of a refund for floor stocks taxes paid or collected

in the absence of the filing with the Commissioner of a timely claim for refund in accordance with Regulations prescribed by the Commissioner and approved by the Secretary. It was alleged in the motion that petitioner had failed to comply with the requirements of Section 903 and the applicable Regulations in that it had furnished no evidence to the Commissioner in support of its claim from which the Commissioner could have determined that it bore the burden of the tax and had not shifted it directly or indirectly to others. The District Court granted the motion and dismissed the suit on January 4, 1943 (R. 29). The judgment of the District Court was affirmed on appeal (R. 46).

ARGUMENT

Petitioner contends that the submission of evidence to the Commissioner in support of its claim for refund of floor stocks taxes paid under the Agricultural Adjustment Act is not a prerequisite under Section 903 of the Revenue Act of 1936 (Appendix, *infra,* p. 11) to the maintenance by it of an action in the District Court for the refund (Pet. 4–5, 9–17). The contention clearly has no merit.

Section 902 of the Act (Appendix, *infra,* pp. 10–11) requires the claimant of a refund of floor stocks taxes to establish that it bore the burden of the taxes and did not shift that burden either directly or indirectly to another. The validity of this

requirement has been sustained by this Court. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. The District Courts are given jurisdiction of such claims for refund (Section 905, Appendix, *infra,* p. 12), but Section 903 prohibits the allowance of a refund unless—

> a claim for refund has been filed * * * in accordance with regulations prescribed by the Commissioner with the approval of the Secretary [of the Treasury].

The requirement that such a claim be filed with the Commissioner before litigation may be instituted "is a familiar provision of the revenue laws." *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269, 272. Its practical purpose is the disposition of most of such claims by departmental action and without litigation. *Morristown Knitting Mills* v. *United States,* 42 F. Supp. 817, 824 (C. Cls.).

Section 903 of the Act requires that "All evidence relied upon in support of such claim shall be clearly set forth under oath", and the Regulations promulgated by the Commissioner, with the approval of the Secretary, require a claimant for refund of amounts paid as floor stocks taxes to prepare the claim in accordance with the instructions contained on P. T. Form 76 and with the Regulations and to substantiate each element of the claim by clear and convincing evidence. Treasury Regulations 96, Articles 201, 202 and 301 (Appendix, *infra,* pp. 12–13). The latter re-

quirement is reiterated in the instructions which are a part of P. T. Form 76 (R. 17), and the form itself directs the listing of evidence under Schedule D (R. 15).

Thus, Section 903 and the Regulations which implement it require evidence to be submitted to the Commissioner with a claim for refund of floor stocks taxes. This being true, Section 903 prohibits the allowance of a refund in the absence of the submission of any evidence to the Commissioner in support of such a claim, and the District Court properly dismissed the complaint petitioner filed in that court.

Contrary to petitioner's contention, the pertinent decisions uniformly support this conclusion. See *Weiss* v. *United States,* 135 F. 2d 889 (C. C. A. 7th); *Lee Wilson & Co.* v. *Commissioner,* 123 F. 2d 232 (C. C. A. 8th); *Lee Wilson & Co.* v. *Commissioner,* 111 F. 2d 313 (C. C. A. 8th); *Landrum* v. *Commisisoner,* 122 F. 2d 857 (C. C. A. 8th); *Tennessee Consolidated C. Co.* v. *Commissioner,* 117 F. 2d 452 (C. C. A. 6th); *Jaubert Bros.* v. *United States,* 50 F. Supp. 366 (E. D. La.); *Brandwein & Co.* v. *United States,* 44 F. Supp. 16 (N. D. Ill.); *Morristown Knitting Mills* v. *United States, supra.* None of the decisions cited by petitioner as being in conflict with the decision below (Pet. 4–5, 8–9, 11–17) holds that a claimant for a refund of floor stocks taxes is not required to submit any evidence to the Commis-

sioner in support of its claim. In each of the five cases cited by petitioner which involve Title VII of the Revenue Act of 1936,[1] there was evidence submitted to the Commissioner and the holding in each case was simply that, under such circumstances, finality does not attach to the Commissioner's determination and that in an action in the District Court for recovery of floor stocks taxes the taxpayer is not limited to the evidence submitted to the Commissioner.[2] Of the four other decisions cited by petitioner, three[3] contain

[1] *Bethlehem Baking Co.* v. *United States*, 129 F. 2d 490 (C. C. A. 3d); *Bricker Baking Co.* v. *Rothensies*, 46 F. Supp. 742 (E. D. Pa.); *Bullock's, Inc.*, v. *United States*, 43 F. Supp. 861 (S. D. Cal.), appeal dismissed on stipulation of counsel, 127 F. 2d 864 (C. C. A. 9th); *Ney* v. *United States*, 33 F. Supp. 554 (W. D. Va.); *Hutzler Bros. Co.* v. *United States*, 33 F. Supp. 801 (D. Md.).

[2] We do not understand petitioner to contend that it submitted any evidence whatever to the Commissioner in support of its claim for refund. It is clear, in any event, that the statements set forth in Schedule D of the claim (R. 15) were at best statements of ultimate facts and were not affirmative evidence that petitioner bore the burden of the tax, was not relieved thereof, was not reimbursed therefor, and did not shift the burden directly or indirectly. See *Weiss* v. *United States*, *supra*; *Lee Wilson & Co.* v. *Commissioner*, 111 F. 2d 313 (C. C. A. 8th) and 123 F. 2d 232 (C. C. A. 8th); *Landrum* v. *Commissioner*, *supra*; *Tennessee Consolidated C. Co.* v. *Commissioner*, *supra*; *Brandwein & Co.* v. *United States*, *supra*; *Morristown Knitting Mills* v. *United States*, *supra*.

[3] *Paul Jones & Co.* v. *Lucas*, 33 F. 2d 907 (W. D. Ky.), affirmed *per curiam*, 64 F. 2d 1016 (C. C. A. 6th); *Fidelity & Columbia Trust Co.* v. *Lucas*, 7 F. 2d 146 (W. D. Ky.); *Snead* v. *Elmore*, 59 F. 2d 312 (C. C. A. 5th).

similar holdings in respect of other statutes, and the fourth[4] is merely a judgment awarding a refund of floor stocks taxes.

CONCLUSION

The decision below is correct and involves no conflict of decisions or important, unsettled question of law. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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AUGUST 1944.

[4] *Hanna* v. *United States* (W. D. Tex.), entered June 29, 1940 (27 A. F. T. R. 1135).